IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

THE MEDICAL PROTECTIVE COMPANY, Plaintiff, v. DANIEL B. MCMILLAN, M.D., and AUGUSTA HEALTH CARE FOR WOMEN, Defendants.	)	CIVIL ACTION NO. 5:01CV00073 MEMORANDUM OPINION JUDGE JAMES H. MICHAEL, JR.

This matter comes before the court on the August 16, 2002, motion for summary judgment filed by the plaintiff, The Medical Protective Company (MedPro), the August 16, 2002 motion for summary judgment filed by the defendant, The Doctors' Company (Doctors), and the September 5, 2002, cross-motion for summary judgment, motion to dismiss, and motion to join Shana J. Shulter (Shulter) filed by the defendants, Daniel B. McMillan (McMillan) and Augusta Health Care for Women (AHCW).

The above-captioned civil action was referred to the presiding United States Magistrate Judge for proposed findings of fact, conclusions of law, and a recommended disposition. *See* U.S.C. § 636(b)(1)(B). In his October 29, 2002 Report and Recommendation (as corrected on October 31, 2002), Magistrate Judge B. Waugh Crigler rendered to this court a report setting forth findings, conclusions, and recommendations for the disposition of the aforementioned filings. The plaintiff filed timely objections to portions of the Magistrate's Report and

Recommendation. Defendants McMillan and AHCW filed a timely response to the plaintiff's objections on November 18, 2002. The Doctors filed a timely response to the plaintiff's objections on November 20, 2002.

The court has performed a *de novo* review of those portions of the Report and Recommendation to which objections were made. *See* U.S.C. § 636(b)(1)(C) (West 1993 and Supp. 2000); FED.R.CIV.P. 72(b). Having thoroughly considered the entire case, all relevant law, and for the reasons stated herein, the court shall GRANT IN PART the motion for summary judgment filed by MedPro and declare only that there is no coverage under its claims-made policy with McMillan and AHCW on the Shulter malpractice claim, but DENY its motion in all other respects; (2) GRANT IN PART the motions for summary judgment filed by the defendants McMillan, AHCW, and Doctors in so far as they seek dismissal of MedPro's claims for reimbursement of attorney's fees and costs incurred in defending McMillan and AHCW in the state court action, GRANT the motion for summary judgment filed by McMillan and AHCW in so far as it seeks a declaration of coverage under the Doctors policy, but DENY the motions for summary judgment filed by McMillan, AHCW, and Doctors in all other respects; (3) DENY the motion of McMillan to dismiss this action against him as moot; (4) and ACCEPT the Report and Recommendation of the Magistrate Judge.

I.

The court will rely on the Magistrate Judge's recitation of the facts involved in this matter. This action arises out of a state court action instituted by Shana J. Shutler originally against McMillan, Mark P. Brooks, M.D. (Brooks), and AHCW alleging professional negligence on the

part of both physicians in September, 1999, for which Shutler also claimed liability on the part of AHCW under the doctrine of *respondeat superior*. It is undisputed that some time in mid-June, 2000, McMillan and AHCW received a letter dated June 9, 2000, from Neal S. Johnson, Esq., counsel for Shutler, which was written "to request a complete copy of [Shutler's] medical records..." At that time, McMillan and AHCW were insured under a "claims made" policy issued by MedPro effective October 1, 1999, to October 1, 2000. The parties do not dispute that on or about June 19, 2000, and at McMillan's direction, Katrina Breen, the administrative supervisor for McMillan and AHCW copied the chart. McMillan and AHCW state that one copy was sent to Johnson *per* the request, one copy was retained, and one was mailed to MedPro. MedPro asserts that it did not receive a copy of the medical records, but acknowledges receipt of the Johnson letter request for medical records. Ms. Breen did not know the reason for the request for these medical records, and McMillan gave no explanation for directing Johnson's request be honored. (*See* Breen Dep. at 15-16.) According to Ms. Breen, nothing in addition to a copy of what was being sent to Johnson was sent to MedPro at that time. By letter dated June 23, 2000, and addressed to McMillan, MedPro acknowledged receipt of the request for medical records, which it characterized as a "routine records request and not as a claim under your policy" and thus, "not a **Medical Incident**." Plaintiff's Mot. Summ. J. at Ex. D (emphasis in original). As explained by this letter, there were three things that could occur to trigger coverage under MedPro's policy, namely: a) receipt of a notice of legal action; b) receipt of a notice to hold the Insured responsible; or c) receipt of a notice of a medical incident from which it could be believed allegations of liability may result. *Id.* Undeniably, MedPro took the position that none

of the requirements to trigger coverage under its policy had been met, and it advised McMillan and AHCW that coverage was not triggered at that point, declining to treat the forwarding of Johnson's request for medical records as any kind of event triggering such coverage. *Id.* The letter went on to inform McMillan and AHCW to the effect that if any of the triggering events under the policy later occurred, the matter would be considered at that time, provided however, there was continuous coverage through the date of such later notification. *Id.*

There also is evidence in the record before the court indicating that MedPro had some information about Ms. Shutler's treatment not found in the letter request for medical records that was received before or contemporaneously with sending its letter to McMillan informing him that no triggering event had occurred. The in-house form, which is entitled "Suit-Claim-Incident" and which bears a date of June 23, 2000, revealed under the heading "Facts" that MedPro had received the request for medical records from AHCW, noted the "initial complaint" of the patient which precipitated treatment, and indicated that a letter would be sent to the insured. The letter, described above, was sent, and the policy with MedPro expired on October 1, 2000, without any further notification or report of a triggering event being made by the insureds.

For the period October 1, 2000, through October 1, 2001, McMillan, Brooks and AHCW became insured under a new "claims made" policy with Doctors. Under Coverage A (for physicians) and Coverage B (for the physician's business entity) of the policy, Doctors extended professional liability insurance that covered both McMillan and AHCW for "[A]ll sums which the *Insured* shall become legally obligated to pay as damages because of injury to which this policy applies arising out of a *medical incident*..." Plaintiff's Mot Summ. J. at Ex. 3, The

Doctors' Company NON- ASSIGNABLE CLAIMS MADE POLICY at 1) (emphasis in original) The policy also contained exclusionary clauses, which, in pertinent part, provided as follows:

> C. EXCLUSIONS
>
> 1. APPLICABLE TO COVERAGES A AND B- PROFESSIONAL LIABILITY
>
> This policy does not apply:
>
> a. to *claims* or circumstances which have been reported in writing by or on behalf of an *Insured* to the Exchange (Doctors), or reported verbally or in writing to any other *insurer*, prior to the effective date of this policy.

Id. at 2.

In addition, and relied upon heavily by Doctors to support the arguments it makes on summary judgment, the policy provided:

> V. WHEN *CLAIM* IS TO BE CONSIDERED AS FIRST MADE
>
> A. A *claim* arising out of Coverage A and Coverage B shall be considered as being first made at the earlier of the following times:
>
> 1. when the *Insured* first gives notice to the Exchange that a *claim* has been made in accordance with Section Viii, A; or
>
> 2. when the *Insured* first gives written notice to the exchange....of specific circumstances, involving injury to particular person(sic), arising out of a *medical incident* covered herein, which may subsequently result in a *claim*.
>
> B. All *claims* arising out of the same *medical incident* shall be considered as having been made at the time the first *claim*

is made to the Exchange.

Id. at 5.

No specific definition of "medical incident" is set forth in the Doctors policy. The term is used throughout the policy, however, in the context of an event that leads to bodily injury, and, under Section VIII, Conditions, the policy refers to a "*medical incident*" as something "**likely** to result in a *claim*... *Id.* at 8 (*Italics* in original, **Bold** emphasis added.)

By letter dated February 28, 2001, Neal Johnson, counsel for Shutler, notified McMillan, Brooks, and Richard Graham, President of AHCW, that he had been retained by Ms. Shutler in connection with treatment she received in the fall of 1999 involving diagnosis and treatment of endometriosis. Briefs in Support of Mots. of Defendants McMillan *et al.* at Ex. C. As far as the record before this court reflects, for the first time Johnson informed the recipients that Shutler's medical care was a "deviation from the standard of care" due her, further indicating the claimant's belief that her "claim" was "very serious" and asked that the claim be forwarded immediately to the appropriate professional liability carrier. *Id.*

By letter dated March 7, 2001, the physicians and AHCW informed Doctors of the claim. *Id*. Doctors, through Matt Powell, informed Renie Galford of AHCW that MedPro should be the carrier to extend coverage in this case. According to the testimony, Powell then assisted Galford in crafting a letter sent on March 13, 2001, to MedPro indicating as much. *Id.* Some dialogue with MedPro then occurred concerning whether MedPro had any record of receiving Ms. Shutler's chart some months before, but in any event, by letter dated March 21, 2001, MedPro made firm its decision to decline coverage on the former claims made policy with McMillan and

AHCW. *Id.* The medical providers once more pursued Doctors. After exchanging more information, Doctors, likewise, made a determination that Shutler's claim against McMillan and AHCW was excluded, though it undertook both coverage and defense of Brooks on the basis that his notice of the claim against him was appropriate under its policy.

Ms. Shutler instituted suit in the Circuit Court of Augusta County for medical negligence by both McMillan and Brooks. AHCW was joined as a party defendant in the state court action in a claim alleging vicarious liability for the alleged negligence of both physicians under the doctrine of *respondeat superior*. Doctors provided counsel to Brooks and defended his interests. MedPro denied coverage but, under reservation of rights, elected to provide representation to McMillan and AHCW. MedPro then instituted this action which has undergone routine discovery. During the pendency of this case, Shutler suffered a voluntary non-suit in the state court against McMillan on all claims and on her vicarious liability claim against AHCW premised on McMillan's conduct. The Order of dismissal was entered by the presiding state judge on November 30, 2001, "without prejudice pursuant to Va. Code § 8.01-380" entirely as to McMillan, and it deemed Shutler's suit against AHCW amended to "delete any claims" against it "based upon vicarious liability for the acts of ..." McMillan. Plaintiff's Mot. Summ. J. at Ex. 4.

The parties agree that six months has elapsed since the entry of the Order of dismissal, and no new action has been instituted against McMillan; as a result, Virginia's statute of limitations now has run on all Shutler's claims against McMillan. Counsel for AHCW has represented that Shutler has threatened to resurrect her claims against AHCW based upon its vicarious liability

for McMillan's conduct.

Moreover, there is no dispute that AHCW remains potentially liable to Shutler on her claims of vicarious liability based upon Brooks' alleged medical negligence. In that connection, Doctors, likewise, has declined either to cover or to defend any vicarious liability claim against AHCW on the same basis it declined to extend coverage to McMillan, namely either that AHCW knew of the claim or incident before it switched carriers and did not report it to Doctors, or that AHCW actually was covered by MedPro because MedPro had been put on notice of the "incident" or "claim" during the covered period.

In the end, MedPro seeks a declaration that no claim was made or preserved during its policy period, and it seeks reimbursement against the medical care providers (McMillan and AHCW) or Doctors, or both, for its defense costs thus far incurred in the underlying action in state court. Doctors, likewise, takes the position that coverage was excluded under its policy on the grounds that a "medical incident" had occurred during the MedPro policy period which either had been reported to MedPro or which was known by McMillan and AHCW but not disclosed to Doctors when it issued its policy. McMillan and AHCW take the simple position that one or the other insurance policy covers Shutler's claims against them, and further asks the court to join Shutler as a party to this case because complete relief cannot be granted without her presence.

II.

A party is entitled to summary judgment when the pleadings and discovery show that there are no genuine issues as to any material fact, and that the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

"[S]ummary judgment ... is mandated where the facts and the law will reasonably support only one conclusion." *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 279 (4th Cir. 2000) (quoting *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991)). If the evidence is such that a reasonable jury could return a verdict in favor of the non-moving party, then there are genuine issues of material fact. *See Anderson*, 477 U.S. at 248. All facts and inferences shall be drawn in the light most favorable to the non-moving party. *See Food Lion, Inc. v. S.L. Nusbaum Ins. Agency, Inc.*, 202 F.3d 223, 227 (4th Cir. 2000). Guided by these principles, the Magistrate Judge recommends that this court GRANT IN PART the motions for summary judgment filed by the defendants, McMillan, AHCH, and Doctors in so far as they seek dismissal of MedPro's claims for reimbursement of attorney's fees and costs incurred in defending McMillan and AHCW in the state court action, GRANT the motion for summary judgment filed by McMillan and AHCW in so far as it seeks a declaration of coverage under the Doctors policy, but DENY the motions for summary judgment filed by McMillan, AHCW, and Doctors in all other respects.

III.

A. Factual Objection – *Whether MedPro Voluntarily Undertook a Defense of McMillan and AHCW Under Reservation of Rights:*

The plaintiff asserts two objections to the Magistrate Judge's Report and Recommendation. The first objection is purely factual in nature. Plaintiff MedPro objects to the Magistrate's factual finding that "MedPro voluntarily undertook a defense of McMillan and AHCW under reservation of rights." Plaintiff's Objections, at 1 (quoting Report and Recommendation, at 14). MedPro asks this court to modify the aforementioned factual finding

to state that MedPro "reluctantly undertook the defense of McMillan and AHCW after being threatened with litigation." Plaintiff's Objections, at 2. In support of their argument that the factual finding should be altered, MedPro explains that defendant McMillan and defendant AHCW "made it clear that they would pursue legal options if [MedPro] did not provide them with a defense to Shana Shulter's state court claims." *Id.*

What the plaintiff fails to recognize, however, is that the presiding Magistrate Judge already considered the evidence presented by MedPro. After considering all of the evidence, Magistrate Judge Crigler explained that

> [t]here are no facts presented in the record before the court that would allow for a reasonable inference that MedPro's decision to defend under reservation of rights was anything but its own voluntary decision, made only after it had counted the costs and risks associated with taking some other course of action. MedPro's counsel argued that it was faced with the prospect of a bad faith claim if it both denied coverage and left its former insureds in a position to have to defend themselves. That simply was, and often is, a risk that comes with the business territory MedPro has chosen to occupy.

Report and Recommendation, at 14.

While the court has no doubt that in MedPro's subjective opinion it "reluctantly undertook the defense of McMillan and AHCW after being threatened with litigation," the Magistrate Judge was charged with formulating objective findings of fact in his report and recommendation. In his opinion, and in the opinion of this court after examining the same record, MedPro voluntarily

undertook a defense of McMillan and AHCW under reservation of rights. Like the Magistrate Judge, the court fails to see how the mere fact that MedPro faced risks associated with denying both coverage and a defense amounts to anything more than the ordinary risks an insurance carrier faces when it decides to enter this field of insurance. Accordingly, MedPro's factual objection shall be OVERRULED.

B. Legal Objection – *Whether MedPro is Entitled to Reimbursement of Attorney's Fees and Costs:*

Plaintiff MedPro also asserts a legal objection to the Magistrate Judge's Report and Recommendation. Specifically, the plaintiff objects to the Magistrate Judge's recommendation that the court grant the respective motions for summary judgment filed by the defendants in so far as they seek dismissal of MedPro's claims for reimbursement of attorney's fees and costs incurred in defending McMillan and AHCW in the state court action. Plaintiff's Mot. Summ. J, at 2.

While the court agrees with the Magistrate's conclusion that the information provided did not constitute written notice of a medical incident, it is worthy of note that, until that determination was made, the issue of coverage was in dispute between MedPro and Doctors. To that end, MedPro had a contractual duty to defend McMillan and AHCW until it was determined by the court whether MedPro or the Doctors were responsible for coverage.

As the Magistrate Judge explains, "MedPro does not rely on any provision of its insurance policy with McMillan and AHCW or offer the court a single authority supporting its right to recover these expenses against any party to this case ..." Report and Recommendation, at 14.

Even now, in objecting to the Magistrate's recommendation, MedPro still fails to cite any provision of its insurance policy to support its theory of recovery. In fact, MedPro's own writings militate against awarding them attorney's fees.

Not only did MedPro elect to defend McMillan and AHCW without obtaining any agreement from its insureds to reimburse it if it were found not to have coverage, the plaintiff also wrote to the insured that:

> This law firm will defend you *at the expense of the Company*. ... Even though we are compensating the firm to defend you, we do so without waiving any rights under the policy.
>
> ***
>
> As you are aware the Company has previously determined that this initial report was not sufficient to trigger coverage. We have also learned that your current carrier, The Doctor's Company, has likewise taken a position denying coverage. In the future it may be necessary for the two carriers to seek legal clarification as to what duties are owed you either for defense and/or indemnification. In this regard the Company reserves the right to withdraw its defense to your claim, upon a legal finding that we have correctly interpreted our obligation to you. Likewise should there be a finding that Company's interpretation was not correct, then you would be entitled to the full protection of your policy, subject to any other conditions which may apply.

MedPro's Motion for Summary Judgment, Exhibit 13 (emphasis added). Not only does this language not reserve a right to seek reimbursement, it assured McMillan and AHCW that MedPro would provide a defense at its expense. Even more, while the writing reserved MedPro's rights under the policy, the policy itself contains no provision for MedPro to recover attorney's fees or any other cost incurred in defending its insureds. To be clear, then, plaintiff MedPro has no right under its insurance contract to seek reimbursement from its insureds. The analysis, however, does not end here.

In support of its legal objection, MedPro also points to the case of *Buss v. The Superior Court of Los Angeles County*, 939 P.2d 766 (1997) for the proposition that "courts in other jurisdictions have held that an insurer may seek reimbursement from an insured for defense costs." Plaintiff's Objections, at 2. *Buss*, however, is easily distinguishable from the case at bar.

In *Buss*, the California Supreme Court held that when some claims are potentially covered under a policy and others are not, the insurer has a duty to defend the entire action. *Buss*, 939 P.2d at 774-75. Even after it is determined which claims were and were not covered, "the insurer may not seek reimbursement for defense costs" as to claims at least potentially covered. *Id.* at 775. The insurer may, however, seek reimbursement when claims take the form of a "mixed action," an action in which some claims are potentially covered and others are not.

In this case, MedPro was confronted with a claim against its insured that was potentially covered under MedPro's policy because the insured had provided MedPro with certain information that about the incident during the policy period. The *Buss* Court admonished that the duty to defend "is extinguished only prospectively and not retroactively: before, the insured had a duty to defend." *Id.* at 773; *see also Colony Ins. Co. v. G&E Tires & Services, Inc.*, 777 So.2d 1034, 1038 (Ct. App. Fla. 2000). In the present matter, there was a legitimate question at the front end as to which policy covered the underlying claims. Put differently, before the court found that MedPro was not responsible for the coverage of McMillan and AHCW, there was a question as to which carrier was responsible for the coverage of the insureds, MedPro or the Doctors. Therefore, even under the logic employed in *Buss*, the case cited by the plaintiff, MedPro cannot assert a viable basis on which it can be reimbursed by McMillan and AHCW.

In summation, not only does MedPro have no right under its insurance contract to seek reimbursement from its insureds, there is no case law supporting the plaintiff's theory of reimbursement. To the contrary, all of the decisional authority suggests that MedPro is not entitled to reimbursement from its insureds for choosing to defend a claim at least potentially covered under its policy. *See, e.g., Colony Ins. Co. v. G&E Tires & Services, Inc.*, 777 So.2d 1034 (Ct. App. Fla. 2000); *Liberty Mutual Ins. Co. v. FAG Bearings Corp.*, 153 F.3d 919, 924 (8th Cir. 1998); *In re: Hansel*, 160 B.R.66 (Bankr. S.D. Texas 1993). Accordingly, plaintiff MedPro's legal objection to the Magistrate Judge's Report and Recommendation shall be OVERRULED.

IV.

Because neither the plaintiff nor either of the defendants filed timely objections to the Magistrate Judge's recommended dispositions as to the other issues before the court, there is no reason for the court to address the issues. In the interest of completeness, however, the court notes that having thoroughly reviewed the entire case and all relevant law, the court is in complete agreement with the Magistrate Judge's analysis. For the reasons articulated in the Magistrate's Report and Recommendation, the court shall GRANT, in part, the motion for summary judgment filed by MedPro and declare only that there is no coverage under its claims-made policy with McMillan and AHCW on the Shutler malpractice claim. The court shall also DENY the motion of McMillan to dismiss this action against him.

V.

For the reasons articulated herein, the court shall (1) GRANT IN PART the motion for

summary judgment filed by MedPro and declare only that there is no coverage under its claims-made policy with McMillan and AHCW on the Shulter malpractice claim, but DENY its motion in all other respects; (2) GRANT IN PART the motions for summary judgment filed by the defendants McMillan, AHCW, and Doctors in so far as they seek dismissal of MedPro's claims for reimbursement of attorney's fees and costs incurred in defending McMillan and AHCW in the state court action, GRANT the motion for summary judgment filed by McMillan and AHCW in so far as it seeks a declaration of coverage under the Doctors policy, but DENY the motions for summary judgment filed by McMillan, AHCW, and Doctors in all other respects; and (3) DENY the motion of McMillan to dismiss this action against him as moot.

Additionally, the court shall OVERRULE the plaintiff's objections to the Magistrate Judge's Report and Recommendation. The court shall ADOPT the Magistrate Judge's Report and Recommendation in its entirety. The court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court, and argument would not aid in the decisional process.[1] An appropriate Order shall this day enter.

[1] Pursuant to *U.S. v. Raddatz*, 447 U.S. 667, 674 (1980), the district court is not required to rehear testimony on which the magistrate judge based his findings and recommendations in order to make an independent evaluation of credibility. Specifically, the Supreme Court found that "[w]e find nothing in the legislative history of the statute to support the contention that the judge is required to rehear the [arguments] in order to carry out the statutory command to make the required 'determination.'"

The Clerk of the Court hereby is directed to send a certified copy of this Memorandum Opinion and the accompanying Order to Magistrate Judge Crigler and to all counsel of record.

ENTERED:

_____
Senior United States District Judge

_____
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

THE MEDICAL PROTECTIVE COMPANY, Plaintiff, v. DANIEL B. MCMILLAN, M.D., and AUGUSTA HEALTH CARE FOR WOMEN, Defendants.	)	CIVIL ACTION NO. 5:01CV00073 ORDER JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED, ORDERED, AND DECREED

as follows:

(1) The "Plaintiff's Objections to the Report and Recommendation," filed November 8, 2002, shall be, and they hereby are, OVERRULED;

(2) The Magistrate Judge's Report and Recommendation, filed October 29, 2002 (as corrected on October 31, 2002), shall be, and it hereby is, ACCEPTED and ADOPTED in its entirety;

(3) The plaintiff's "Motion for Summary Judgment," filed August 16, 2002, shall be, and it hereby is, GRANTED IN PART in that it shall be DECLARED that there is no coverage under the plaintiff's claims-made policy with McMillan and AHCW on the Shulter malpractice claim. The plaintiff's motion for summary judgment shall be DENIED in all other respects;

(4) The Motions for Summary Judgment filed by McMillan, AHCW, and Doctors shall be GRANTED IN PART in so far as they seek dismissal of MedPro's claims for reimbursement of attorney's fees and costs incurred in defending McMillan and AHCW in the state court action. Additionally, the Motion for Summary Judgment filed by McMillan and AHCW shall be GRANTED in so far as it seeks a declaration of coverage under the Doctors policy, but the Motions for Summary Judgment filed by McMillan, AHCW, and Doctors shall be DENIED in all other respects; and

(5) the motion of McMillan to dismiss this action against him as moot shall be, and it hereby is, DENIED.

The Clerk of the Court hereby is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to Magistrate Judge Crigler and to all counsel of record.

ENTERED:

_____
Senior United States District Judge

_____
Date